

Message Text

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TOKYO PASS TREAS. ASST. SEC. BERGSTEN

E.O. 11652:N/A

TAGS: ETRD, JA

SUBJECT: BACKGROUND ON ZENITH CASE

REF: A) TOKYO 225 B) TOKYO 18030 12/8/76
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1. BEGIN LIMITED OFFICIAL USE: IN RESPONSE TO REFTEL A,
THE DEPARTMENT IS PROVIDING THE EMBASSY WITH BACKGROUND
ON THE ZENITH CASE AND BY SEPTTEL, A REPORT ON A MEETING
WITH MR. FUKADA, THE ECONOMIC MINISTER OF THE JAPANESE
EMBASSY. WE BELIEVE THE TWO CABLES SHOULD PROVIDE THE
EMBASSY WITH INFORMATION TO RESPOND TO QUESTIONS FROM THE

GOJ. REGARDING PRESS TREATMENT, WE BELIEVE THAT IT IS PREMATURE, PRIOR TO THE CUSTOMS COURT DECISION, TO DISCUSS THE CASE IN ANY DETAIL WITH THE JAPANESE PRESS OR RUN THROUGH THE OPTIONS (NONE PARTICULARLY PROMISING) ON SUSPENSION OF LIQUIDATION. HOWEVER, ON A BACKGROUND BASIS, THE EMBASSY CAN USE THE INFORMATION IN THIS CABLE WITH THE PRESS AS WELL AS THE STATUS AND TIMING INFORMATION IN SEPTTEL. THE EMBASSY SHOULD EMPHASIZE THAT THE USG WILL DO ALL IT CAN TO WIN THE CASE ON APPEAL IF THERE IS AN ADVERSE DECISION IN THE CUSTOMS COURT. END LIMITED OFFICIAL USE.
BEGIN UNCLASSIFIED:
BACKGROUND INFORMATION ON ZENITH CASE IN U.S. CUSTOMS COURT

2. ON JANUARY 7, 1976, THE DEPARTMENT OF THE TREASURY PUBLISHED ITS FINAL DETERMINATION THAT NO BOUNTIES OR GRANTS WITHIN THE MEANING OF THE COUNTERVAILING DUTY LAW, WERE BEING PAID ON EXPORTS OF CONSUMER ELECTRONIC PRODUCTS FROM JAPAN.

THE ZENITH RADIO CORPORATION SUBSEQUENTLY DECIDED TO SEEK A COURT DETERMINATION THAT TREASURY SHOULD HAVE CONSIDERED THE REBATE OF THE COMMODITY TAX ON EXPORTED ELECTRONIC PRODUCTS, WHICH WAS ONE OF THE ALLEGED BOUNTIES INVESTIGATED IN THE COUNTERVAILING DUTY CASE, TO BE A BOUNTY OR GRANT UNDER U.S. LAW. ZENITH THEREFORE FILED A COMPLAINT IN THE UNITED STATES CUSTOMS COURT.

3. A COUNTERVAILING DUTY LAW WAS ORIGINALLY ENACTED IN THE UNITED STATES IN 1897. IN ITS ADMINISTRATION OF THE LIMITED OFFICIAL USE

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LAW SINCE THEN, THE TREASURY DEPARTMENT HAS NOT CONSIDERED THE REBATE OF INDIRECT TAXES, SUCH AS THE COMMODITY TAX, TO BE BOUNTIES OR GRANTS TO THE EXTENT THAT THE AMOUNT REBATED DID NOT EXCEED THE AMOUNT OF TAX THAT WOULD HAVE BEEN ASSESSED DIRECTLY ON THE PRODUCT IF IT WERE SOLD IN THE HOME MARKET OF THE EXPORTING COUNTRY.

4. IN DECIDING THIS CASE, THE U.S. CUSTOMS COURT MUST DETERMINE IF THE TREASURY SHOULD HAVE COUNTERVAILED AGAINST THIS REBATE BECAUSE OF THE PRECEDENT SET IN U.S. SUPREME COURT DECISIONS IN DOWNS V. UNITED STATES (1903) AND NICHOLAS V. UNITED STATES (1919). THESE CASES CONCERN THE ASSESSMENT OF COUNTERVAILING DUTIES AGAINST A COMPLEX SYSTEM OF BOUNTIES ON EXPORTED RUSSIAN SUGAR IN 1898 AND THE PAYMENT OF AN EXPORT SUBSIDY ON GIN EXPORTED FROM THE UNITED KINGDOM. THE TREASURY DEPARTMENT NEVER INTERPRETED THESE TWO DECISIONS AS REQUIRING THE IMPOSITION OF COUNTERVAILING DUTIES ON THE REBATES OF INDIRECT TAXES.

5. A PROVISION OF THE TRADE ACT OF 1974 GAVE THE U.S. CUSTOMS COURT THE JURISDICTION TO REVIEW NEGATIVE COUNTERVAILING DUTY DETERMINATIONS; PREVIOUSLY IT HAD ONLY BEEN ABLE TO REVIEW THE IMPOSITION OF COUNTERVAILING DUTIES. THUS, U.S. INDUSTRIES FOR THE FIRST TIME HAD THE OPTION OF SEEKING COURT REVIEW OF DECISIONS OF THE TREASURY NOT TO IMPOSE COUNTERVAILING DUTIES. BOTH ZENITH AND THE UNITED STATES STEEL CORPORATION HAVE FILED COMPLAINTS SEEKING A COURT RULING THAT THE TREASURY SHOULD IMPOSE COUNTERVAILING DUTIES WHEN INDIRECT TAXES ARE REBATED.

6. THE U.S. CUSTOMS COURT IS REVIEWING MOTIONS FOR SUMMARY JUDGMENT IN THIS CASE ON WHICH ORAL ARGUMENTS WERE HEARD ON NOVEMBER 9, 1976. BECAUSE OF THE IMPORTANCE OF THE CASE, THE UNITED STATES GOVERNMENT REQUESTED THAT LIMITED OFFICIAL USE

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IT BE HEARD BY A THREE JUDGE PANEL. IN PRESENTING MOTIONS FOR SUMMARY JUDGMENT, ZENITH AND THE UNITED STATES GOVERNMENT HAVE STATED THAT THERE ARE NO QUESTIONS OF FACT AT ISSUE AND THAT A TRIAL TO DETERMINE THE FACTS IS NOT REQUIRED. THEY HAVE ASKED THE THREE JUDGE PANEL TO RULE ON THE LEGAL ISSUE OF WHETHER THE REBATE OF THE JAPANESE COMMODITY TAX SHOULD BE CONSIDERED A BOUNTY OR GRANT UNDER U.S. LAW.

7. SHOULD THE CUSTOMS COURT DETERMINE THAT THE TREASURY SHOULD HAVE COUNTERVAILED AGAINST THE REBATE OF THE COMMODITY TAX, THE DECISION WILL BE APPEALED FIRST TO THE COURT OF CUSTOMS AND PATENT APPEALS (CCPA) AND

THEN IF NECESSARY TO THE SUPREME COURT. A DECISION AGAINST THE U.S. GOVERNMENT WOULD NOT RESULT IN THE IMMEDIATE IMPOSITION OF ANY INCREASED DUTIES ON THESE PRODUCTS BUT WOULD REQUIRE A PROCESS KNOWN AS "SUSPENSION OF LIQUIDATION." THIS MEANS THAT THE FINAL AMOUNT OF DUTY TO BE ASSESSED WOULD NOT BE DETERMINED UNTIL A FINAL RESOLUTION OF THE CASE IN THE COURTS. IT WOULD REQUIRE THAT IMPORTERS POST BOND TO COVER THE POTENTIAL DUTY LIABILITIES. ALTHOUGH THE BONDING COSTS ARE NOT HIGH, THE UNCERTAINTY OF THE EVENTUAL LIABILITY COULD BE A SIGNIFICANT DETERRENT TO IMPORTERS.

8. THE USG BELIEVES THE CONSISTENT POSITION OF THE TREASURY DEPARTMENT THAT THE REBATE OF INDIRECT TAXES IS NOT COUNTERVAILABLE WILL ULTIMATELY BE UPHELD BY THE COURTS. IN THIS REGARD, IT IS IMPORTANT TO BEAR IN MIND THE SEPARATION OF POWERS IN THE UNITED STATES AMONG

THE EXECUTIVE, JUDICIAL AND LEGISLATIVE BRANCHES. AMONG THE POWERS OF AMERICAN FEDERAL COURTS IS THE AUTHORITY TO DETERMINE IF THE EXECUTIVE HAS PROPERLY CARRIED OUT LAWS ENACTED BY THE CONGRESS.

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9. BECAUSE OF THIS JUDICIAL INDEPENDENCE AND THE ABSENCE OF MANDATORY TIME LIMITS FOR DELIBERATIONS OF THE COURTS, IT IS DIFFICULT TO SET A DEFINITE TIMETABLE FOR THE APPELLATE PROCESS. HOWEVER, SHOULD THE CUSTOMS COURT RULE BY THE END OF FEBRUARY, IT MIGHT BE POSSIBLE, UNDER THE BEST OF CIRCUMSTANCES, TO OBTAIN A DECISION FROM THE COURT OF CUSTOMS AND PATENT APPEALS BY MID-1977 AND THEREUPON PRESENT THE CASE TO THE SUPREME COURT FOR CONSIDERATION IN THE FALL OF 1977. SHOULD THE SUPREME COURT AGREE TO HEAR THE CASE AT THIS TIME, ITS DECISION SHOULD BE KNOWN BY LATE 1977 OR EARLY 1978. THE UNITED STATES GOVERNMENT WILL SEEK TO EXPEDITE THE JUDICIAL PROCESS TO THE EXTENT POSSIBLE IN VIEW OF THE POTENTIAL EFFECTS OF THIS CASE ON OUR INTERNATIONAL TRADE.
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